MOTION FILED
JUL 2 - 2009

No. 09-1461

In The
Supreme Court of the United States

ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, *et al.*,

Petitioners,

v.

ROMAN STEARNS, in His Official Capacity as Special Assistant to the President of the University of California, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE CATHOLIC LEAGUE AND IGNATIUS PRESS IN SUPPORT OF PETITIONERS

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MOTION OF THE CATHOLIC LEAGUE AND IGNATIUS PRESS FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF *CERTIORARI*

Pursuant to Rule 37 of the Rules of this Court, the Catholic League and Ignatius Press respectfully move for this Court to grant leave to file the attached brief as *amici curiae* in the *Association of Christian Schools International v. Stearns* case. The Petitioners have consented to the filing of this brief. The Respondents have not informed the *amici* as to whether they consent or oppose the filing of this brief.

Amicus, The Catholic League for Religious and Civil Rights, is the nation's largest Catholic civil rights organization, and is located at 450 Seventh Avenue, New York, New York 10123. Founded in 1973, it defends the rights of Catholics, lay and clergy alike, to participate in American life without defamation or discrimination. Headquartered in New York City, the Catholic League has hundreds of thousands of members across the nation.

The Catholic League filed a brief with the Ninth Circuit regarding this case as *amicus curiae*. The Catholic League maintains that high school courses with a religious viewpoint have long met standards of academic excellence, and that attempts to disqualify them from consideration at the University of California are as bogus as they are biased. It further contends that the Association of Christian Schools International merits standing. In addition, the Ninth

Circuit erred when it said that the third prong of the *Hunt* test was not operative. This holding conflicts with holdings in the First, Third and Seventh Circuit courts. It is vitally important for organizations like the Catholic League to know that its members need not personally participate in lawsuits which affect their interests in cases like this one. Associational standing, as the courts have previously recognized, is pivotal to the cause of justice.

Amicus, Ignatius Press, is a Catholic publishing company, based in San Francisco. Ignatius Press was founded in 1978 and has over 1,800 titles in print including authors such as Pope Benedict XVI, Mother Theresa and Mark Twain. It produces textbooks used in Catholic high schools, and is a partner in Universities of Western Civilization ("UoWC"). UoWC has an online Great Books curriculum for high school students (the Liberal Studies Program). The American Council on Education has approved 48 units of this program for advanced college credit. It would be an unjust discrimination against our students if such courses were rejected by the University of California system merely because they were taught from within the Catholic intellectual tradition.

It is for these reasons that *amici* respectfully request this Court grant this motion for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI*[1]

Amicus, Catholic League for Religious and Civil Rights, is the nation's largest Catholic civil rights organization. Founded in 1973, it defends the rights of Catholics, lay and clergy alike, to participate in American life without defamation or discrimination. Headquartered in New York City, the Catholic League has hundreds of thousands of members across the nation.

The Catholic League maintains that high school courses with a religious viewpoint have long met standards of academic excellence, and that attempts to disqualify them from consideration at the University of California are as bogus as they are biased. It further contends that the Association of Christian Schools International merits standing, and that the Ninth Circuit erred when it said that the third prong of the *Hunt* test was not operative.

It is vitally important for organizations like the Catholic League to know that its members need not personally participate in lawsuits which affect its interests in cases like this one. Associational

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The Petitioners have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

standing, as the courts have previously recognized, is pivotal to the cause of justice. We saw how important this was in the case of *Catholic League for Religious and Civil Rights v. City of San Francisco*, 567 F.3d 595 (9th Cir. 2009) without the opportunity to represent our members from San Francisco in a lawsuit against government officials for abridging the First Amendment rights of Catholics, the case likely would never have been litigated.

Amicus, Ignatius Press, is a Catholic publishing company, based in San Francisco. Ignatius Press was founded in 1978 and has over 1,800 titles in print including authors such as Pope Benedict XVI, Mother Theresa and Mark Twain. It produces textbooks used in Catholic high schools, and is a partner in Universities of Western Civilization ("UoWC"). UoWC has an online Great Books curriculum for high school students (the Liberal Studies Program). The American Council on Education has approved 48 units of this program for advanced college credit. It would be an unjust discrimination against our students if such courses were rejected by the University of California system merely because they were taught from within the Catholic intellectual tradition.

It is for these reasons that *amici* respectfully request this Court grant the petition for a writ of certiorari to the Association of Christian Schools International.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth by Petitioners in the petition for writ of certiorari.

INTRODUCTION

The University of California system ("UC") requires its in-state applicants to take a total of fifteen year-long courses that have been approved by UC. In its review, UC regularly rejects courses regardless of their teaching standard, content and skills. Moreover, if a course provides a religious viewpoint when taught in a Catholic, Jewish or Protestant school, it is also rejected. The Association of Christian Schools International ("ACSI") challenged this practice, but was denied associational standing necessary to bring their claim. The Ninth Circuit held that ACSI could not satisfy the third prong of the test, specifically because the claim asserted or the relief requested required the participation in the lawsuit of each of the individual members. This decision conflicts directly with opinions reached in the First, Third and Seventh Circuits. In addition, the court failed to recognize that associational standing is consistently allowed for injunctive and declaratory relief, as sought here. Therefore, in view of the circuit split, ACSI's petition for a writ of certiorari should be granted.

LEGAL ARGUMENT

I. SUMMARY OF THE ARGUMENT

The University of California has a history of rejecting courses from religious high schools when the instruction provides a religious viewpoint. UC claims that these courses fail to adequately prepare students for collegiate study. Many of the courses include a wide variety of religious and non-religious information taught to enhance student's critical thinking skills in an effort to prepare them for college. The Association of Christian Schools International challenged this policy as violative of their First Amendment and Equal Protection rights. Upon appeal from the United States District Court for the Central District of California, the Ninth Circuit upheld UC's rejection of courses containing a religious viewpoint as they did not violate the religion clauses of the First Amendment or the Equal Protection Clause.

While there are many aspects of the case that should be reviewed, this brief focuses on the court's reinterpretation of the associational standing test, set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Specifically, the Ninth Circuit erred in holding that ACSI failed to establish the third prong of the test, and thus was denied associational standing. This holding conflicts with the decisions of this Court, as well as the First, Third and Seventh Circuits. Because ACSI satisfies the third prong of the *Hunt* test, this Court should grant the petition for a writ of certiorari.

II. THE NINTH CIRCUIT REINTERPRETED THE ASSOCIATIONAL STANDING TEST CONTRARY TO THE DECISIONS OF THIS COURT, AS WELL AS THE FIRST, THIRD AND SEVENTH CIRCUITS.

The Ninth Circuit reinterpreted the associational standing test set forth in *Hunt*, holding that ACSI failed to satisfy the third prong. *Id.* An association has standing to bring suit on behalf of its members when 1) its members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and, 3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Id., quoting Warth v. Seldin*, 422 U.S. 490 (1975). Specifically the Ninth Circuit held that, "the plaintiff's as applied claims and the relief they seek, although equitable in nature, both require individualized proof specific to each rejected course and the school that offered it." *Association of Christian Schools International, et al. v. Stearns*, 2010 WL 107035 at *2 (9th Cir. Jan. 12, 2010). This reinterpretation conflicts with the holdings from the First, Third, and Seventh Circuits relative to the third prong of the association test. In addition, the Ninth Circuit failed to recognize that associational standing is consistently allowed for injunctive and declarative relief, as sought here, as opposed to cases in which damages are sought. *Hunt*, 432 U.S. at 343.

The First Circuit interpreted the third prong of the associational standing test in *Playboy Enterprises, Inc. v. Public Service Comm'n of Puerto Rico*, 906 F.2d

25 (1st Cir. 1990). In *Playboy Enterprises*, Playboy Enterprises, Inc. ("PEI") and the Puerto Rico Cable Television Association ("PRCTA") filed suit alleging that the [Puerto Rico] Commonwealth's obscenity statute violated the First Amendment. *Id.* at 27. The defendants argued that neither the Cable Association nor PEI had standing to bring the suit, because only one member of the Association [Teleponce, Inc.] had standing to sue. *Id.* at 33. Therefore, because the claim asserted and relief requested required the participation of an individual member in the lawsuit [Teleponce, Inc.], PRCTA failed the third prong of the associational standing test. The First Circuit panel disagreed with this interpretation stating that "just because a claim may require proof specific to individual members of an association does not mean the members are required to participate *as parties* in the lawsuit." *Id.* at 35. In support of its reasoning, the court referenced this Court's decision in *Warth* which held that an association had no standing to sue on behalf of its members, when seeking monetary relief to compensate its members' injuries. *Id.* Here, the only reason for *requiring* the members' participation as parties was so that the members are eligible to receive their own damages. *Playboy Enterprises*, 906 F.2d at 35. The court stated that "we see no reason why the claim for injunctive relief in this case *requires* the participation of any Cable Association member, or how Teleponce's participation as a party would make a significant difference." *Id.* at 36. Therefore, the court reversed the district court's decision and granted associational standing.

The Third Circuit also dealt with the issue of associational standing in *Hospital Council v. City of Pittsburgh*, 949 F.2d 83 (3rd Cir. 1991). In *Hospital Council*, the Hospital Council of Western Pennsylvania filed suit against several cities and a county alleging that the defendant governmental units had attempted or were attempting to coerce tax exempt member hospitals to make payments in lieu of taxes. *Id.* at 85. Further, the Council alleged those hospitals that did not agree to such payments would have their tax exempt status challenged. *Id.* The defendants argued, and the district court held, that associational standing is improper because the claims asserted and the relief requested require the participation of each individual hospital in the lawsuit. *Id.* at 89. The Third Circuit disagreed noting that the Supreme Court has repeatedly held that requests by an association for declaratory and injunctive relief do not require participation by the association's individual members. *Id.*; *see also Pennell v. City of San Jose*, 485 U.S. 1 (1988). The court also cited *Warth* which held that standing is not barred even if it requires the participation of *some* members as parties, because *Hunt's* prong allows associational standing "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable." *Hospital Council*, 949 F.2d at 89, *quoting Warth*, 422 U.S. at 511. As a result the court found that "it appears that an association may assert a claim that requires the participation by *some* members." *Hospital Council* at 89.

Finally, the Seventh Circuit interpreted the third prong of the associational standing test in *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993). In *Retired Chicago Police Ass'n*, a group of City of Chicago employees challenged a settlement agreement reached in state court regarding a dispute over the terms of a health care plan offered by the city. *Id.* at 588. After a string of lawsuits, legislation was enacted changing the terms of the city's health care plans which ultimately raised costs for each annuitant. *Id.* at 589. Among other findings, the district court dismissed the Retired Chicago Police Association's ("RCPA") complaint for lack of associational standing. The district court found that the RCPA could not satisfy the third prong of *Hunt* due to the fact that the claims would require the participation and testimony of individual annuitants. *Id.* at 600. On appeal, the Seventh Circuit began its analysis by first citing *Hospital Council*, and then stating that the approach taken by the Third Circuit was "a sound one." *Id.* at 601. Specifically, the court agreed with the finding that an association may assert a claim that requires participation by *some* members. *Retired Chicago Police Ass'n*, 7 F.3d at 601. "This evidence [that the alleged breach occurred] might be supplied by the evidentiary submissions of some of the members. Each annuitant's presence as a party would not be required." *Id.* at 603. In line with the Third Circuit's reasoning, the court reversed the district court's finding that the RCPA lacked standing.

III. ACSI SATISFIES THE THIRD PRONG OF THE *HUNT* TEST AND THEREFORE SHOULD BE GRANTED ASSOCIATIONAL STANDING.

ACSI challenged the University of California's policy of evaluating courses taken by high school students in order to determine whether they were college preparatory, claiming that the policy violated plaintiff's First Amendment and Equal Protection rights. 2010 WL 107035 at *1. The Ninth Circuit upheld the district court's finding that the third prong of the associational standing test could not be satisfied because "both [claims] require individualized proof specific to each rejected course and the school that offered it." *Id.* at *2. The other circuits that have addressed the associational standing issue conflict with the Ninth Circuit's reinterpretation and would allow ACSI standing. According to the First Circuit, just because a claim may require proof specific to individual members of an association, that does not mean the members are required to participate as parties. *Playboy Enterprises*, 906 F.2d at 35. Requiring each individual school to be a named party in the suit is not only cumbersome but unnecessary. Therefore, as in *Playboy*, the evidence for the relief sought, declarative and injunctive, does not require each party, or specific school, to be named.

Similarly, the Third Circuit would grand ACSI standing. The court found that *Hunt*'s third prong allows associational standing so long as the nature of the claim and of the relief sought does not make the

individual participation of each injured party indispensible. *Hospital Council*, 494 F.2d at 89. Looking toward the nature of the claim, ACSI is challenging UC's policy of rejecting private schools' courses that adequately teach standard content if they add a religious viewpoint. The nature of this claim surely does not make the individual participation of each injured party indispensible. Rather, the nature of the claim requires a thorough analysis of the First Amendment precedent of this Court, and other circuits, in relation to the viewpoint discrimination currently viewed as permissible by the UC system. In addition, evidence of each school's course description and the UC's rejection are contained in UC's documents, thus making the participation of each party unwarranted. Similarly, the Seventh Circuit, having adopted the Third Circuit's interpretation, would also grant ACSI associational standing. Evidence can be provided [supporting the First Amendment and Equal Protection claims] by some of the members, and therefore each individual's presence as a party is not necessary.

Finally, turning toward the relief sought, the Ninth Circuit ignores the practice of this Court and other circuits which have uniformly allowed associational standing for injunctive and declaratory relief, sought here, even while consistently denying standing for damages claims. *See, e.g., Hunt,* 432 U.S. at 343; *Warth*, 422 U.S. at 340-41. The Third Circuit, guided by *Warth,* stated that the only reason for *requiring* the members' participation as parties was

so that the members could receive their own damages, should they receive any. ACSI is not seeking individual damages awards, and therefore individual member participation should not be required.

Requiring individual evidence of each school and each course rejected is unnecessary. ACSI seeks declaratory and injunctive relief. Namely, that the practice of discrediting certain high school courses because they add religious elements, regardless of their appropriate academic substance, violates the First Amendment and the Equal Protection Clause. In essence, ACSI is not seeking a case by case determination regarding the courses rejected. As such, an individual analysis of each school and course is inappropriate. The inquiry is really whether the UC system's rejection of courses in religious high schools is inconsistent with the First Amendment and the Equal Protection Clause. Neither the claim asserted nor the relief requested requires the participation of individual members in this lawsuit. Therefore, the third prong of *Hunt* is satisfied, and both the district court and the Ninth Circuit erred in denying ACSI associational standing.

CONCLUSION

In view of the circuit split discussed above, the petition should be granted.

Respectfully submitted,

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